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Vol. II

SUPPLEMENTAL TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 17

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST KNOWN AS WESTERN AVENUE GOLF CLUB, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1935.

CERTIORARI GRANTED MAY 13, 1935.

SUPREME COURT OF THE UNITED STATES

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VOL. II.

INDEX.

	Page
Supplemental proceedings before United States Board of Tax Appeals	1
Exhibit "B"—Declaration of trust by T. A. Morrissey and James M. O'Brien, October 4, 1921	1
Stipulation for supplemental transcript	38
Clerk's certificate	40
Order allowing certiorari	41

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VOL. II

EXHIBIT "B"

WESTERN AVENUE GOLF CLUB
DECLARATION OF TRUST

We, T. A. Morrissey and James M. O'Brien, both of Los Angeles, in the County of Los Angeles, State of California, hereby declare that we will and our successors shall hold the following described property, to-wit:

> The Southeast quarter of Section Twenty-six (26), Township 2 South, Range 14 West, S. B. B. & M. in the above mentioned City, County and State, excepting the east half of the southwest quarter of the southeast quarter of said southeast quarter,

which property has already been conveyed to us, and also any and all other property, real, personal, or mixed, which may hereafter be conveyed or transferred to or acquired by us or them as trustees hereunder, together with the proceeds and avails thereof in trust upon the trusts hereinafter set forth to maintain and to dispose of the same, and to collect, receive, hold and distribute the net income thereof for the benefit of the beneficiaries from time to time, whose beneficial interests in said property are represented by certificates for shares of beneficial interest issued hereunder according to the number of such shares held by them respectively, and in accordance with the priorities hereinafter expressed, and in the

manner and subject to the stipulation herein contained, to-wit: [1*]

1. Wherever the term trustees is used herein it is intended to include and shall be construed to include the undersigned trustees and their successors in trust; wherever the term shareholder is used herein it is intended to include and shall be held to include any holder of a certificate evidencing a share or shares of beneficial interest issued hereunder and the successor in interest of the holder of such certificate.

2. The trustees in their collective capacity shall be designated as "WESTERN AVENUE GOLF CLUB", or by such other designation or name as the trustees may adopt, and under such name and so far as may be practicable and convenient, shall manage and administer the trust estate, execute all their instrments of writing, and do all other things relating to the trust hereby created; and every duly authorized instrument executed in the name of "WESTERN AVENUE GOLF CLUB", or any such other designation or name as may hereafter be adopted by the trustees, shall have the same effect as if executed in the names of the trustees as such.

3. The trustees shall be two in number, except and until the number of trustees shall have been increased and the persons hereinbefore mentioned and who execute this declaration of trust, shall be and shall constitute the original trustees.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

4. At any time and from time to time the trustees may increase the number of trustees, in which event the persons to fill the places thus created shall be selected and their successors shall be selected by a majority of the trustees in office at the time of such selection.

5. Whenever a vacancy from death, resignation, inability to serve, or removal, occurs among the Trustees, then the Trustees then in office as such, shall elect the successor Trustee to fill the vacancy thus created, and this right shall continue at all times; it being hereby intended that the right to select Trustees in the manner hereinabove indicated shall not be exhausted by any one or more exercises thereof, but that such right, so far as the said Trustees are concerned, shall continue during the existence of this trust.

6. As soon as any trustees so selected under the provisions of either of the two preceding paragraphs shall have accepted the terms of this trust by an instrument in writing executed in duplicate if required, and delivered to the continuing trustees, the trust estate shall forthwith vest in the continuing trustees and in such new trustees or trustee without any further act or conveyance, with all the right, title, interest, privileges, powers, duties and estate which the former trustee or trustees possessed during his or their incumbency, to the same extent as if such newly selected trustee or trustees had been the original and first trustee or trustees under this trust. [2]

7. Any trustee may resign his office of trust hereunder by a written instrument acknowledged in the manner prescribed for the acknowledgment of deeds, and by sending the same by registered mail to the continuing trustees or one of them, and by executing and delivering to the continuing trustees such instrument or instruments in writing quit-claiming to the continuing trustees as such all right, title and interest of said resigning trustee as such in any part of the trust estate.

8. Where there are more than two trustees a majority only shall be necessary to unite in any act to bind the trust property; where there are only two trustees both must unite in any act to bind the trust property.

9. The trustees are authorized:

(a) To purchase, buy, own, hold, encumber, contract for, take title to, deal with or otherwise acquire the above described or other lands, tenements, hereditaments and real property of all kinds, and any interest therein, and to sell, convey, transfer, quitclaim, assign, set over, encumber, mortgage, pledge, exchange, contract to sell, or otherwise deal with and dispose of the above described or other lands, tenements, hereditaments, and real property of all kinds, and any interest therein, upon such terms and for such consideration, whether for cash or for securities, or upon credit, as and whenever the trustees in their absolute discretion may deem proper. To rent, lease and assign or license the use of the above described or any other lands, tene-

ments, hereditaments and real property, and any interest therein, upon such terms and consideration as and whenever it may be deemed wise and proper by the trustees in their sound discretion. To farm, till, operate, work and cultivate, or to cause or permit to be farmed, tilled, operated, worked and cultivated, the above described or any other lands or real estate, upon such terms and conditions, and for such considerations and remunerations, whether for cash or securities or for fixed or contingent returns, whether cash or in commodities and merchandise, as and whenever in the absolute discretion of the trustees may seem advisable and proper.

(b) To construct or acquire and operate, maintain and repair golf courses, tennis courts, swimming pools, bowling alleys and clubhouses, and stores, shops, cafes, and other businesses incidental thereto, and to charge and receive fees, profits and emoluments in connection with any of said operations, and to sell or dispose of upon such terms or conditions as the trustees in their discretion may determine such rights or concessions in connection with any of said operations as they may determine.

(c) To manage and control the trust estate, and receive rents, profits, proceeds, income and avails thereof, whether from [3] or in the form of real property, personal property, or mixed property, and in connection therewith to buy, discount or otherwise acquire, hold, own, invest in, deal in, accept, guarantee, endorse and sell, assign, mortgage, pledge, exchange, have discounted and otherwise deal with or dispose of, upon such terms and for such considera-

tion, whether for cash or for other securities, as the trustees in their absolute discretion may deem proper, shares of stock, participation shares, trust certificates, certificates of interest, bonds or securities of corporations, trusts, trustees, or associations in whatsoever business engaged, commercial paper, commercial securities, promissory notes, leases, mortgages, conditional sales, open accounts receivable, book debts and claims, acceptances, drafts, foreign and domestic bills of exchange and bills of lading, finance bills, warehouse receipts, trust receipts, warrants, contracts and choses in action of every kind and description, whether issued, made or owned by, or existing in favor of, or against, individuals, corporations, associations, trusts or trustees, either with or without recourse.

(d) To make loans or advances to any person, firm, corporation or association of any moneys or other valuable things forming a part of the trust estate, without collateral security, or to take as collateral security for the payment of any such loans or advances, such real, personal or mixed property or rights or choses in action as the trustees in the exercise of an absolute discretion may desire; to grant, procure, extend and guarantee credits, loans and investments, and to indorse or otherwise assure credits, loans and investments, and to indorse or otherwise assure and guarantee the payment and re-payment thereof, with or without collateral security; and to act as trustee or otherwise for the securing of loans and investments and the financing thereof.

(e) To become guarantor and surety upon letters of credit, open accounts, acceptances, drafts, notes, foreign and domestic bills of exchange, contracts and agreements of every kind and description, whenever the Trustees in their management of the trust estate deem it advisable or expedient so to do, to promote, protect and conserve this trust and interests of the beneficiaries and, whenever the Trustees in their absolute discretion deem it advisable for the purpose of increasing the income of the trust estate, and of promoting, protecting and conserving the property constituting the trust estate or part thereof, to act as brokers, factors, agents, trustees, managers, receivers, liquidators and attorneys in fact and as organizers and reorganizers of enterprises requiring financing.

(f) To vote or cause to be voted any shares of stock, certificates of interest, bonds, or other securities of corporations, trusts or associations, at the time forming any part of [4] the trust estate; to assign to any person or persons such shares, certificates, bonds or securities, and to allow the same to stand in the name or names of such person or persons so long as the trustees shall think proper, for the purpose of qualifying such person or persons as a director or directors, or as trustee or trustees, or as an officer or officers of such corporations, trusts or associations or otherwise, for the purpose of maintaining the organization of such corporations, trusts, associations, or for any other purpose deemed expedient by the Trustees; and to cause such shares of stock, certificates of interest, bonds or other

securities at the time forming any part of the trust estate to be transferred into the names of or vested in the Trustees or any of them jointly, with the right of survivorship in any one of them in such manner as not to give notice that they are trustees thereof, or that the same are effected by any trust, or to allow or cause such shares of stock, certificates of interest, bonds or other securities to remain in or to be transferred to the name or names of any other persons, firm, association, trust or corporation, and to entrust to any bank or trust company or safe deposit company for safekeeping any or all of the certificates of stock, bonds, securities, claims and all documents and paper comprised in or relating to the trust estate.

(g) To collect and sue for, and to receive and receipt for, all moneys due to the trustees; to represent the beneficiaries hereunder in all suits and legal proceedings in any court of law or equity, or before any body or tribunal; to commence suits and legal proceedings and to defend same for the purpose of protecting and conserving the interests of the trust estate, the trustees or the beneficiaries, and to employ counsel; to compound, compromise, abandon or adjust by arbitration or otherwise any action, suits, proceedings, disputes, claims, demands and things relating to the trust estate, and to give time, with or without security, for the payment or delivery of any debts or property claimed in favor of the trust estate, and to pay or satisfy any debts or claims, upon any evidence that the trustees may deem sufficient.

(h) To buy or join with any person, firm, corporation or association in buying the property of any person, firm, corporation, trust or association, any of the securities which are included in the trust estate, or any property in which the trustee, as such, shall have or may hereafter acquire an interest, and to allow the title to any property so bought to be taken in the name or names of, and to be held by, such person or persons as the trustees shall name or approve.

(i) To procure such insurance for the protection of the trust estate against loss or liability as the trustees may in the exercise of their absolute discretion decide, including [5] policies or bonds protecting against loss by fire, theft, liability, infidelity, injury or death to any trustee, officer or employee, or any other insurable risk, and to pay out of the trust estate necessary premium therefor.

(j) To hold or invest from time to time any moneys under the control of the trustees by them deemed to be available for the purpose, in any security or property which the trustees may select or approve, in the same manner and to the same extent as if they were not trustees, but making such investment as natural persons, without any limitation in respect of the character of the securities invested in, and to sell or otherwise dispose of any such investments and reinvest the proceeds thereof, or make, execute and issue either in person or by one or more of their duly authorized officers, representatives, agents or employees, any notes, drafts,

acceptances, bills of exchange, finance bills, bonds or debentures, with or without security; to enter into any and all contracts, guaranties, obligations and other instruments which in the opinion of the trustees may be necessary or expedient to carry out, promote, protect and conserve the trust estate, including the making of guaranties to secure the performance of contracts and obligations of other parties; and to charge the trust estate with any and all obligations of indebtedness incurred by the trustees in the exercise by them of any or all of the foregoing powers conferred upon them; provided, however, the trustees shall have no power or authority whatsoever to borrow money on the credit of the beneficiaries, or to make any contract on their credit for repayment of any money raised by mortgages, pledge, charge or other encumbrances in pursuance of the provisions hereof, or to make any contract or to incur any liability whatsoever binding the beneficiaries personally.

(o) Generally, to do all and singular, such things as may be necessary or advantageous in the execution of the foregoing powers, or any of them, and not inconsistent therewith, and to manage and conduct the affairs of the trust estate as fully as if the trustees were the absolute owners of the trust estate; and to make and execute and do all such agreements, deeds, instruments and things as they may deem proper in the execution of any of the said powers.

(p) The foregoing clauses shall be construed both as objects and powers and no enumeration of specific powers herein found shall be held to limit or restrict the powers of the trustees in any manner unless expressly so provided or clearly implied herein; to vest in and delegate to any trustees or committees selected from their own number, and [6] to officers, representatives, including counsel, agents and employees, such powers and authority conferred upon the trustees by this declaration as the trustees may specify, and to alter, modify or revoke any such grant or delegation of powers and authority at discretion.

(q) To make, change, revoke and rescind such rules and regulations, not inconsistent with the terms of this instrument, as they deem necessary or desirable for the management of any part of the trust estate and for the management of themselves, their committees, officers, representatives, directors, agents and employees; to adopt and use a common seal, but such seal may or may not be affixed to instruments executed by the trustees, executive committee, or the officers of the trust, and the absence of such seal shall in nowise effect the validity of such instruments; to remove any trustees (except the original trustees) officer or member of any committee, when in the judgment of the trustees the interests of this trust shall so require. Such removal shall create a vacancy which shall be filled in the manner herein prescribed; to appoint an advisory board consisting of not to exceed fifteen (15) per-

sons, who shall be known as Directors, but the appointment of such advisory board shall not be construed as limiting any of the powers of the trustees hereunder.

(r) To appoint an Executive Committee consisting of three (3) persons selected from such Advisory Board, who shall act for said Board when the full Board is not in session, or when it may not be convenient to call a meeting of said Advisory Board.

(s) To appoint and designate from amongst their own number or otherwise such executive officers to furnish them assistance in the management of the trust, including a president, and one or more vice presidents, a secretary, a treasurer, and such other officers as the trustees may from time to time deem expedient, and to define their respective duties, and said duties so defined may be any or all the trustees may possess hereunder; any person so appointed may hold more than one office.

(t) To remove, or discharge any or all members of the Advisory Board or Executive Committee or persons holding any of said offices and to abolish such Advisory Board or Executive Committee or any of said offices at any time.

(u) To employ, remove, or discharge such other representatives, agents and employees of any kind as the trustees may deem proper.

(v) To define the tenure of office or employment of all officers, representatives, agents and employees, and to define their duties and to fix and pay their compensation out of the trust estate. [7]

(w) The naming of any specific duties and powers herein shall not be construed as limiting the general powers conferred upon the trustees by this Agreement and Declaration of Trust, such powers shall continue during the existence of this trust, and shall not be exhausted by one or more exercises thereof; the trustees shall hold the legal title to, and have the absolute and exclusive control of, all property at any time belonging to this trust, and they shall have the absolute control, management nd disposition thereof.

(x) The trustees may, and the directors and Executive Committee shall hold meetings at such time or times and at such place or places and upon and after notice given in such manner and for such time as the trustees may at any time hereafter and from time to time hereafter determine upon; a majority of the trustees, director or executive committee shall constitute a quorum at any of their respective meetings; any action finally taken or authorized by a majority of all the then trustees shall be valid, and when so authorized must be performed.

(y) The death or resignation of the trustees or any of them shall not operate to annul or terminate this trust, or to revoke any existing agency created pursuant to the terms of this instrument.

10. The trustees, officers, representatives, agents and employees actively engaged in managing the trust estate or rendering services in connection therewith, shall be entitled to receive and shall be

paid such remuneration from the trust estate or the income thereof as from time to time shall be fixed or agreed upon by the trustees. The trustees shall be reimbursed from the trust estate for their expenses and disbursements, including counsel fees, and also in respect of all losses and liabilities by them incurred in administering this trust, and for the payment of such compensation, expenses, disbursements, losses and liabilities the trustees shall have a lien on the trust estate prior to any rights or interest of the beneficiaries thereto or herein.

11. The receipt of the trustees or any of them or any of their representatives, agents or employees thereunto authorized, for moneys or property paid or delivered to them or any of them, shall be an effectual discharge therefrom to the person paying or delivering the same, and no person taking such receipt shall be bound to see to the application of such moneys or property. And no purchaser or person dealing with the trustees shall be bound to ascertain or inquire as to the existence or occurrence of any event or purpose in or for which sale, mortgage, pledge or charge is herein authorized or directed or otherwise as to the purposes or regularity of any of the [8] acts of the trustees, or any of them, purporting to be done in pursuance of any of the provisions or powers herein contained, or as to the regularity of the removal, resignation, or selection of any trustees. And no purchaser or person dealing with any trustee purporting to act under any delegation of authority from the trustees shall be required to

ascertain or inquire whether an occasion exists in which he is authorized so to act, or in which such delegation is permitted, or whether such delegated authority is still subsisting.

12. Every note, bond, contract, instrument, certificate or undertaking, and every other act or thing whatsoever executed or done by the trustees, or any of them, in connection with this trust, shall be conclusively taken to have been executed or done only in their or his capacity of trustee or trustees under this Agreement and Declaration of Trust, and such trustees or trustee shall not be personally liable thereon. Every such note, contract, bond, instrument, certificate or undertaking made or issued by the trustees shall recite that the same is executed or made by them, not individually but as trustees under this Agreement and Declaration of Trust, and may contain any further recital which they or he may deem appropriate.

13. The trustees shall have no power to bind the beneficiaries personally by any act, neglect or default, and all beneficiaries and all persons, corporations, trusts or associations extending credit to, contracting with, or having any claim against the trustees, shall look only to the funds and property of this trust for payment of such contract or claim or for any indemnity or for the payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable from the trustees, so that neither the trustees, directors, executive committee, beneficiaries, nor the officers,

representatives, agents and employees of the trustees, present or future, shall be personally liable therefor.

And any written obligation, contract or undertaking made or issued by the trustees may provide expressly, in substance or effect, as follows:

> "This obligation (contract or undertaking, as the case may be) is made (or issued) by the undersigned, not individually but as trustees under a certain trust agreement creating the WESTERN AVENUE GOLF CLUB, dated September 25, 1921, and hereby made a part hereof, and is enforceable only against, and is payable only out of, the trust property held thereunder, any and all personal liability of the trustees and beneficiaries thereunder being and having been expressly waived by the holder hereof." [9]

14. The trustees shall not be liable for errors of judgment in exercising any of their powers of discretions hereunder or in the appointment of any succeeding or other trustee or officer, director, representative, agent or employee, nor for any loss arising out of any investment made in good faith by the trustees, nor for failure to sue for or to collect or to invest any moneys or property belonging to this trust, or to require security for any investment, or for any act or omission to act performed or omitted by them in the execution in good faith of their powers or discretions hereunder; each trustee shall be answerable and accountable

only for his own several acts, receipts, neglects, and defaults severally and respectively, and not for those of any other trustee or of any of the directors, officers, representatives, agents and employees of the trustees or any of them, or for any bank, trust company, broker or actioneer or other person with whom or into whose hands any trust moneys, property or securities may be deposited or come.

15. Any trustee may acquire, own and dispose of shares of beneficial interest in this trust to the same extent as if he were not a trustee. Any trustee, notwithstanding the fiduciary position which he holds, may serve and deal with the trustees in relation to the trust estate as freely, and be entitled to compensation for services as if he were not a trustee hereunder.

16. No recourse at any time shall be had under or upon any note, bond, contract, instrument, certificate, undertaking, obligation, covenant or agreement issued or executed by the trustees under or pursuant to the terms of this Agreement and Declaration of Trust, or in managing the trustee estate, or by the executive committee or any member thereof, or by any officer, representative, agent or employee of the trustees, or by reason of anything done or omitted to be done by them or any of them, against the trustees individually, or against the members of the executive committee, or any of them, or against any such officer, representative, agent or employee against any beneficiary or the holder of any other security issued by the trustees, either

directly or indirectly, by legal or equitable proceedings, or by virtue of any suit or otherwise, except only to compel the proper application or distribution of the trust estate, it being expressly understood and agreed that—

(a) This Declaration of Trust, and all obligations and instruments executed thereunder, are executed pursuant thereto by the trustees; that—

(b) Any acts done or omitted to be done by them are solely the obligations, instruments, acts and omissions of, or in respect of, the trust estate, and that— [10]

(c) All the obligations, instruments, liabilities, covenants, and agreements, acts and omissions of the trustees as trustees shall be enforced against, and shall be satisfied out of, the trust estate only, or such part thereof as, under the terms and provisions of the Agreement and Declaration of Trust, shall be liable for or chargeable therewith. And all personal and individual liability of the trustees, except as above stated, and of the members of the executive committee, and of all officers, representatives, agents and employees, and of the beneficiaries of this trust, are hereby expressly waived and negatived. Neither the trustees nor their representatives, agents or employees are authorized to contract any debt or do anything which will charge the beneficiaries or bind them personally.

17. No corporation, trust, association or body politic shall be affected by notice that any of its shares of stock, certificates of interest, or bonds or

other securities are subject to this trust, or be bound to see to the execution of this trust, or to ascertain or inquire whether any transfer of any such shares, bonds or securities by the trustees is authorized by this trust, notwithstanding such authority may be disputed by some other person.

18. During the continuance of this trust the beneficial interests therein and thereunder shall be solely evidenced by certificates for shares of beneficial interest for which provision is hereinafter made.

19. Such beneficial shares shall be divided into two thousand (2,000) preferred shares of the par value of One Hundred ($100.00) Dollars each, and two thousand (2,000) common shares of no par value.

20. The holders of record upon the books of this trust of outstanding preferred shares shall be entitled to receive when and as declared by the trustees out of the surplus profits arising from the business of this trust, or surplus, dividends at the rate of $8.00 per share per annum without preference of priority one over the other, before any dividend shall be declared or set aside or paid on the common shares; the said dividends upon the said preferred shares shall be cumulative from and after the date of issuance thereof, and until redemption or retirement thereof; at any time and from time to time when holders of outstanding preferred shares shall have received, or there shall have been reserved for them up to date, all cumulative dividends to

which they may be then entitled hereunder, and when any surplus profits or *surplus profits or* surplus remain thereafter, the holders of record [11] of common shares then outstanding shall be entitled to receive when and as declared by the trustees out of the surplus profits arising from the business of said trust, or surplus, dividends at such rate as may be determined and decided upon by the trustees in the exercise of their absolute discretion, not exceeding the rate of $8.00 per share per annum, but without preference or priority as to said common shares one over the other.

21. If at any time any surplus profits arising from the business of the trust, or any surplus shall remain in the hands of the trustees after there shall have been paid or reserved for payment to the preferred shareholders, all cumulative dividends to which they may then be or theretofore have been entitled out of the surplus profits arising from the business of said trust, or out of the surplus thereof, and after there shall have been paid or reserved for payment to the holders of common shares dividends out of said surplus profits or surplus, equal in amount per share to the dividends per share theretofore paid and then reserved for payment to the holders of preferred shares, the trustees may, in the exercise of an absolute discretion, declare and pay out of such remaining surplus profits and surplus such extra dividends upon the preferred shares and upon the common shares as said trustees may decide and determine, such dividends to be declared, paid, and

distributed to the holders of then outstanding preferred shares, and to the holders of then outstanding common shares, share and share alike, and ratably, and without preference or priority one over the other.

22. In the distribution of the capital assets of the trust upon the liquidation of the affairs thereof as a whole, there shall be first apportioned to the holders of preferred shares then outstanding, out of surplus profits arising from the business of the trust, or surplus, if any such surplus profits or surplus then remain or exist, all or so much of the cumulative dividends at the rate aforementioned as then remain unpaid, if any; if any such surplus profits or surplus are available but insufficient for the purpose last mentioned, then the said distribution thereof to preferred shareholders shall be ratable and without priority or preference as to such preferred shares one over the other; for the purpose of this paragraph only and to determine what, if any, surplus profits or surplus are available after but not before liquidation, the common shares shall be considered as having a tentative par value of $100.00 per share and the amount of outstanding common shares computed on that basis added to the gross par value of all then outstanding preferred shares shall represent the capital stock liability in determining the net assets for such purposes; in case such surplus profits shall be more than [12] sufficient to pay the preferred shareholders all of such unpaid accumulations of dividends, and in case the dividends

then and theretofore paid per share upon preferred shares shall have been in excess of the dividends per share paid upon the common shares, then the remaining surplus profits shall be apportioned to the holders of then outstanding common shares to such extent as would then bring the gross payments of dividends to common shareholders per share up to the gross dividends per share then and at all times theretofore, both before and during such liquidation, received by preferred shareholders; in event any such surplus profits or surplus shall be available but insufficient for the purpose last above mentioned, the said distribution thereof to common shareholders shall be ratable, share and share alike and without preference or priority as to said common shares one over the other; and in event they shall be more than sufficient for that purpose the balance thereof shall be considered capital assets. The capital assets shall thereafter be distributed as follows, to-wit:

(a) There shall be first apportioned to the holders of preferred shares then outstanding in cash or otherwise, the par value of said preferred shares before any of said capital assets shall be distributed to or apportioned to the holders of common shares; if the capital assets shall be insufficient to pay to the holders of preferred shares the total par value thereof, as aforesaid, such capital assets shall be distributed to the holders of said outstanding preferred shares, share and share alike, ratably, and without preference or priority one over the other; in

case the capital assets shall be more than sufficient to pay to the holders of then outstanding preferred shares the full par value thereof, as aforesaid, then the remainder of such capital assets shall be apportioned to the holders of common shares then outstanding to the extent of $100.00 per share; if there shall be insufficient capital assets for that purpose last mentioned the apportionment to such common shareholders shall be ratable, share and share alike, and without preference or priority one over the other; if there shall be more than sufficient capital assets for the said purpose the remainder thereof after apportioning the then outstanding common shareholders the sum of $100,00 per share in cash or otherwise, as aforesaid, shall be distributed and apportioned to the holders of preferred shares then outstanding, ratably, share and share alike and without preference or priority one over the other.

23. The preferred shares shall be non-assessable; the common shares shall be assessable for all purposes contemplated by Section 26 hereof, other than and except the purposes of raising moneys to apportion or distribute to the holders of preferred shares, either by way of dividends or otherwise, [13] and no funds raised by assessment upon the common shares shall be so used; assessments upon the common shares shall be levied only if, as and when decided to be necessary or advisable by the trustees in the exercise of their absolute and exclusive discretion and they shall not be compellable to levy

and collect any assessment. All assessments levied and collected upon common shares shall be carried on the books as a contingent liability to the common shareholders who paid the same, and must be repaid, or funds reserved for repayment thereof, to such shareholders before any dividends, either regular or extra, may be thereafter declared or paid upon any shares, either preferred or common, and before any capital assets may be distributed or paid to any shares, either preferred or common.

24. Any and all dividends and apportionments of capital assets shall be payable only to the holders of then outstanding shares as shown upon the books of the trust and the trustees shall have no liability to any other claimant; payment or distribution of capital assets, as aforesaid, shall be made only upon the surrender and cancellation of the certificate evidencing the shares involved or upon the record owner thereof indemnifying the trustees to such extent and in such manner as the trustees may require against loss resulting from any subsequent production of any lost or destroyed certificates; after the trustees shall have determined to wind up the affairs of the trust they shall fix a liquidation date as of which the liquidation shall become effective and shall give notice for such time and in such manner to the shareholders of record as the said trustees may in the exercise of an absolute discretion decide and determine upon, and all dividends shall cease to accrue and to accumulate upon and after such liquidation date, whereafter any capital assets remaining undistributed on account of the failure of any share-

holder to produce his certificate as required hereinbefore shall be held by the trustees as trustee for such shareholder, without any liability whatever upon said trustees therefor, or for the investment thereof, or for any income thereon, or for any loss from any cause except willful malfeasance upon the part of the said trustee.

25. So long as any of said preferred shares may remain outstanding the trustees shall not issue any shares which shall have any preference to or take priority over the preferred shares hereinbefore authorized, nor issue preferred shares on a parity with those hereinbefore authorized in excess of the number of preferred shares hereinbefore authorized, nor alter in any manner the rights or preferences herein granted to the preferred shares hereinbefore authorized, but subject to these limitations the trustees may at any time and from time to time, as they in the exercise of an absolute discretion, may decide and determine upon, increase the number of common shares over and above the number hereinbefore authorized, and issue preferred shares junior in right to those hereinbefore authorized, and of such par value, if any, and in such amount [14] and number as the said trustees may desire, and issue such bonds, collateral, trust certificates and other evidences of indebtedness as the said trustees in the exercise of their sound discretion may determine and decide upon.

26. The trustees may at any time hereafter and from time to time levy and collect assessments upon the outstanding common shares for the purpose of paying expenses, conducting business or paying

debts in the manner and form and to the extent provided by the Civil Code of the State of California, for the levying and collection of assessments by private corporations organized for profit, as such provisions of the Civil Code may from time to time be amended, with these sole changes, to-wit:

First: The trustees shall not be limited at any time in the amount of any assessment which they may levy and collect.

Second: An assessment may be levied and its collection enforced notwithstanding the whole or any portion of an assessment previously levied remains unpaid.

Third: The order levying the assessment shall be valid and binding if signed by a majority of the trustees then in office without the requirement of any meeting for that purpose.

Fourth: Notice of assessment need not be published in any newspaper, or posted.

Fifth: Notice of delinquent sale need not be published in any newspaper, or posted.

Sixth: The sole liability on the part of the shareholders for non-payment of assessments shall be the sale of their shares and there shall be no personal liability on the part of any of such shareholders for the payment of any of said assessments or any part thereof, and the trustees shall not have power to proceed by action or otherwise to recover the amount of assessment of costs individually from any shareholder, but shall be limited to the proceedings for the sale of any of such shares for non-payment of such assessment.

Seventh: Notice of assessment given personally or by ordinary mail to any shareholder at least five days prior to the delinquent date shall be sufficient as to such shareholder, and that notice of delinquent sale given personally or by ordinary mail to any shareholder who may be delinquent in the payment of any assessment at least five days before the day fixed for the sale of delinquent shares shall be sufficient as against said delinquent shareholder so notified. [15]

Eighth: Any shareholder so notified of the levy of the assessment shall be estopped from asserting the invalidity thereof on account of lack of notice to any other shareholder, and any shareholder so notified of any intended sale of his delinquent shares shall be estopped from asserting the invalidity of any sale on account of the lack of such notice to any other delinquent shareholder.

27. The trustees may at any time and from time to time hereafter purchase in the open market from shareholders at such price not exceeding the then market price as the trustees in the exercise of an absolute discretion may determine and agree upon, one or more preferred shares or one or more common shares from the holders thereof upon such terms and conditions of sale and purchase as may be agreed upon by the trustees in the exercise of their sound discretion, and to that end and for that purpose may use any of the surplus or surplus profits or capital assets of the trust in cash or otherwise for the payment of the purchase price on such shares so purchased, provided, however, that in no

case shall any purchase price paid per share be greater than the then net book value per share, and any and all shares so purchased by the trustees may in the exercise of their absolute discretion be cancelled or held in the treasury of the trust as an asset and part of the trust estate, and thereafter sold, used as collateral or in any other manner that other assets in the hands of said trustees may be used hereunder, and if cancelled the same may nevertheless be subsequently reissued and resold at any time by the trustees.

28. The trustees may at any time and from time to time hereafter sell, pledge or otherwise dispose of any and all of said preferred shares and any and all of said common shares at such price or for such purpose and upon such terms and conditions as the said trustees in the exercise of their absolute discretion may determine and decide upon.

29. As evidence of the ownership of the said shares the trustees shall cause to be issued and delivered to all purchasers or transferees thereof a negotiable certificate or certificates which shall be in such form and contain such matters and things as the trustees in the exercise of their absolute discretion shall determine and decide upon.

30. The trustees may at any time and from time to time distribute to the beneficiaries such income, proceeds or other parts of the trust estate as they may determine. All distribution of the income, proceeds or other parts of the trust estate, and the amount and conditions of payment and distribution thereof among the beneficiaries, except as to the preferred shares, the dividends on which shall be

paid as hereinbefore provided for, and except in case of the termination [16] of this trust, shall rest in the absolute discretion of the trustees, whose decision with respect thereto shall be final. The trustees may retain, undistributed, such sums as they may deem wise to create a sinking, reserve, surplus or contingent fund, provided, however, that no distribution of capital assets as distinguished from surplus or surplus profits shall be made prior to the final winding up of the affairs of the trust as a whole, unless and except in the case of the purchase by the trustees of any then outstanding preferred shares or common shares as hereinbefore provided, and the payment of the purchase price therefor.

31. In case of the loss or destruction of any certificate of shares, the trustees may, under such conditions as they may deem expedient, issue a new certificate or certificates in place of those lost or destroyed.

32. Shares hereunder shall be personal property only and give only the rights in this instrument specifically set forth.

33. The death, insolvency or incapacity of any shareholder during the continuance of this trust, or the levy upon or sale of any share under any attachment, execution, or other process of law whatever, shall not operate to terminate this trust, nor entitle the legal representatives or heirs or assigns or successors in interest, voluntary or involuntary, of such deceased, insolvent, or incapacitated or debtor shareholder to an accounting or distribution or to take any action, at law or in equity, or otherwise, in the courts or elsewhere, against the trustees, but such

legal representatives, heirs, assigns, or successors in interest shall succeed only to the rights of such deceased insolvent, incapacitated or debtor shareholder, subject to this Declaration of Trust, and shall succeed to nothing more.

34. The ownership of shares hereunder shall not entitle such owners to any title in or to the trust property whatsoever, or right to compel a partition or division of the same or an accounting, it being expressly declared that the said shareholders, otherwise sometimes referred to herein as beneficiaries, are cestuis que trustent, and hold no other relation to the trustees than that of cestuis que trustent hereunder. The shareholders shall only have the rights specifically set forth in this instrument, that is to say, the right to dividends, only as the same shall be declared by the trustees, and in case of the liquidation of all assets of the trust the proceeds, after the payment of all debts and liabilities of the trust, shall be divided amongst the shareholders in accordance with their respective priorities and in proportion to their respective holdings. [17]

35. Neither this declaration of trust nor the ownership of any of the shares issued hereunder shall constitute the parties hereto or their respective successors in interest or assigns, or any person who acts hereunder as trustee or who may become a beneficiary hereunder, as partners, nor to impose upon them or any of them any partnership or other liability similar to the liability of partners or any liability whatever other than the liability, if any, expressly imposed by this declaration, it

being expressly stipulated and declared and agreed by the trustees in the execution of this declaration and by the beneficiaries in the acceptance of the certificates evidencing their shares issued hereunder that a trust and not a partnership is hereby created, and that the appointment by the trustees of any directors or executive officers or of an executive committee or of an advisory board or of any other advisory officers is not intended to and shall not be held or construed to lessen the powers of the trustees hereunder, but that in any and every such case such appointment by the trustees shall be exclusively for advisory purposes only, and further that the power vested in the trustees to appoint such representatives or assistants may or may not be exercised by said trustees in their discretion.

36. The fiscal year of the trustees hereunder shall begin on the first day of January, beginning with the year 1922, and end on the 31st day of December in each year.

37. This trust shall continue for a term of twenty-five years from and after the date hereof or until it shall be sooner terminated by the trustees who are thereunto duly authorized and empowered in the exercise of their absolute discretion; upon the expiration of said term or the sooner termination of this trust, as aforesaid, by the trustees, the trustees shall proceed to wind up the affairs of the trust and distribute the assets thereof, or to sell the assets and distribute the proceeds thereof amongst the shareholders in accordance with their respective holdings, and in accordance with and subject to the respective

rights and priorities of the holders of the preferred shares and of the common shares as hereinbefore expressed.

38. Upon the termination of this trust, whether by limitation as above provided, or otherwise, and upon the liquidation of the trust estate, its proceeds shall be applied as follows, to wit:

First: To the payment of all prior costs, charges and expenses then remaining unpaid.

Second: To the payment of all indebtedness or obligations theretofore incurred by or on behalf of the trustees and then remaining unpaid. [18]

Third: To the payment of dividends and distribution of capital assets to the preferred shareholders and common shareholders in accordance with their respective holdings and in accordance with and subject to the respective rights and priorities as hereinbefore expressed.

39. A duplicate original of this declaration of trust shall be deposited with the Commissioner of Corporations of the State of California. In event of the abolition of the said office of Commissioner of Corporations said duplicate original of this declaration of trust and any other documents heretofore deposited or hereafter to be deposited with the Commissioner of Corporations hereunder, shall be deposited in the office required by law to take over and preserve the records and archives of said Commissioner of Corporations, if any, and if not the same shall in that event, but not otherwise, be deposited with such other depositary as the person

last occupying the office of Commissioner of Corporations shall designate, which depositary must be a responsible bank or trust company in the said City of Los Angeles; during the time that the said Declaration of Trust is in the possession of said last mentioned depositary it shall be permitted without further or other authority than that herein now granted, to permit the holder of any share issued hereunder to examine and inspect this Declaration of Trust, but not to remove the same from its office, the test of ownership in any case to be the production of a certificate evidencing such ownership, and such identifications as in the judgment of said depositary may be deemed necessary.

40. The trustees shall also deposit in the office of the Commissioner of Corporations of the State of California, such other and further documents and copies of documents of instruments as they may be lawfully required so to do by the Commissioner of Corporations of the State of California.

41. The trustees from time to time shall determine to what extent and at what times and places, and under what conditions and regulations the accounts, books and documents of the trustees, or any of them, shall be open to the inspection of the beneficiaries, and no shareholder shall have the right to such inspection except as authorized by the trustees.

42. If any person or persons holding in the aggregate twenty (20%) per cent of the outstanding beneficial shares of the trust estate, or twenty (20%) per cent of any class of such shares, shall

present to any officer or trustee of the trust estate a written request for a statement of its affairs, it shall be his duty to make or procure such statement sworn to by the President or the Vice-President, or by the Treasurer, [19] embracing a particular account of its assets and liabilities in detail, and to have the same ready and on file at the principal business office of the trustees within thirty (30) days after the presentation of such request, and such statement shall at all times during business hours be open to inspection of the holder of any beneficial shares, and he shall be entitled to copy the same.

43. Original or duplicate share ledgers containing the names and addresses of holders of the beneficial shares of this trust, and the number of shares of each class held by them, respectively, shall, during the usual business hours of every business day, be open for the inspection of any person or persons holding in the aggregate twenty (20) per cent of the outstanding beneficial shares, or of either class thereof, at the principal business office of the trustees; provided, however, that this provision shall be deemed complied with if the share ledger open for inspection as aforesaid discloses all transfers made up until twenty (20) days before such inspection. The other books of the trustees shall be open to inspection by holders of certificates for shares of beneficial interest upon the terms on which share ledgers are open to their inspection.

44. The trustees may at any time, and from time to time in their absolute discretion, make reports

in writing to the beneficiaries as to the condition, operation and management of the trust estate, or they may convene the holders of preferred beneficial interest shares and the holders of common beneficial interest shares in meeting to make oral or written reports to said beneficiaries, in reference to the administration of the trust and the condition of the trust property, to consider recommendations as to the filling of vacancies existing among the trustees, and for any other purpose which the trustees may determine. The said meeing shall be held at such time and place, and under such conditions and upon such notice as the trustees may determine. At any such meetings, where an advisory vote of the beneficiaries is desired by the trustees, each beneficiary may vote in person, by proxy, or in writing, under such terms and conditions as the trustees may provide. The trustees, however, shall not be bound by any such recommendations or suggestions or by any advisory or other vote of the beneficiaries, nor to act in accordance therewith, but may disregard the same in whole or in part.

45. This agreement and Declaration of Trust may be amended or altered by the trustees in any particular whatsoever, except as regards the exemption from personal liability of the trustees, beneficiaries, executive committee, officers, repre- [20] sentatives, agents, and employees, the priority of preferred beneficial interest shares and the acquired rights of third persons, and except as regards the limitations upon the right of the trustees to increase

the number of preferred shares issuable hereunder or to issue any other shares having any preference or priority over the preferred shares authorized hereunder, and also except as to the provisions hereunder prohibiting the Trustees from distributing capital assets as distinguished from surplus profits prior to the liquidation of the affairs of the trust as a whole, other than in connection with the purchase by the trustees of any shares and except as regards the provisions hereof prohibiting the trustees from levying or collecting assessments upon preferred shares. In the event any such alteration or amendment is made by the trustees the same shall be executed in like manner as this declaration is executed, and attached *to made* a part of this declaration and a copy thereof likewise executed and deposited with the Commissioner of Corporations of the State of California. Nothing in this paragraph contained shall in any way be construed to limit the power of the trustees to increase the number of the common shares or to issue shares junior in right to the preferred shares hereinbefore authorized, and having preference over the common shares.

46. This instrument is executed and delivered by the trustees in the State of California, and with reference to the laws thereof, particularly to the provisions of Sections 857 and 2220 of the Civil Code of said State, and the rights of all parties and the construction and effect of each and every provision hereof shall be subject to, and construed, according to the laws of said State.

47. In the construction of these presents words in the singular number include the plural number and vice versa, and words denoting males include females, and words denoting persons include firms, associations, trusts and corporations, and the word trustees shall extend to and include the trustees for the time being of these presents, and the words beneficiary and shareholders are used synonymously with each other, unless in any of said cases a contrary intention is clearly inferred from the subject matter or context.

IN WITNESS WHEREOF the said trustees have hereunto set their hands and seals to this instrument and to two other instruments of like tenor in token of their acceptance and declaration of the trust hereinbefore set forth on this the 25th day of September in the year of our Lord nineteen hundred and twenty-one.

(Signed) T. A. MORRISSEY [Seal]
(Signed) JAMES M. O'BRIEN [Seal] [21]

State of California,
County of Los Angeles—ss.

On this 4th day of October, 1921, before me, IDA M. DASKAM, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared T. A. MORRISSEY and JAMES M. O'BRIEN, personally known to me to be persons whose names are subscribed to the within instru-

ment, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

[Notarial Seal] (Signed) IDA M. DASKAM, Notary Public in and for the County of Los Angeles, State of California. [22]

United States Board of Tax Appeals

Docket No. 40977.

T. A. MORRISSEY and JAMES M. O'BRIEN, Trustees of an Express Trust, known as Western Avenue Golf Club,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION FOR SUPPLEMENTAL TRANSCRIPT.

The petitioners in the above entitled cause having filed a petition for review of the decision of the United States Board of Tax Appeals by the Circuit Court of Appeals for the Ninth Circuit, and the petitioners having in the praecipe for the record requested that the stipulation of facts be trans-

mitted to the United States Circuit Court of Appeals for the Ninth Circuit, which stipulation of facts referred to and incorporated a certain declaration of trust as exhibit "B" but which declaration of trust was not attached thereto and was not transmitted to the Circuit Court of Appeals for the Ninth Circuit but which should be transmitted, counsel for petitioners and counsel for respondent do hereby stipulate and agree that the Clerk of the United States Board of Tax Appeals may cause to be prepared, certified and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a supplemental transcript of the record of the above entitled [23] cause, which supplemental transcript shall contain the following: Exhibit "B" referred to and incorporated in paragraph two of the stipulation of facts, which said Exhibit "B" is a declaration of trust by T. A. Morrissey and James M. O'Brien dated October 4, 1921.

Counsel further stipulate that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit shall add to the record the said Exhibit "B" and make the same a part thereof.

THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Counsel for Petitioners.

FRANK J. WIDEMAN,
Assistant Attorney General.

[Endorsed]: U. S. Board of Tax Appeals. Filed Jan. 9, 1934. [24]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 24, inclusive, contain and are a true copy of the supplemental transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of June, 1934.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals. [25]

[Endorsed]: No. 7364. United States Circuit Court of Appeals for the Ninth Circuit. T. A. Morrissey and James M. O'Brien, Trustees of an Express Trust, known as Western Avenue Golf Club, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Supplemental Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 2, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.